STATE OF MICHIGAN

In The

SUPREME COURT

(Appeal from the Michigan Court of Appeals)
(Before Owens, P.J., Schuette and Borello, JJ.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD
Plaintiffs-Appellants,

v

STATE OF MICHIGAN
Defendant-Appellee,

and

GAMING ENTERTAINMENT, LLC and LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,
Intervening Defendants-Appellees,

and

NORTH AMERICAN SPORTS MANAGEMENT CO.,
Intervening Defendant.

BRIEF OF AMICI CURIAE

Supreme Court No. 129816

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

BRIEF OF AMICI CURIAE KEN SIKKEMA, SENATE MAJORITY LEADER, AND SHIRLEY JOHNSON, CHAIR OF THE SENATE APPROPRIATIONS COMMITTEE

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INTEREST OF AMICI CURIAE

The *amici curiae* in this case are duly elected members of the Michigan Senate, who by virtue of their leadership position or committee chairmanship share primary responsibility for making the difficult policy decisions regarding tribal gaming in the state of Michigan and for ensuring that all State appropriations are made as required by Const 1963, art 9, § 17. They are Ken Sikkema, the Majority Leader of the Senate, and Senator Shirley Johnson, the Chair of the Senate Appropriations Committee.

This Court has recently granted leave to appeal the Court of Appeals ruling of September 22, 2005, that the Governor's attempt to unilaterally amend a tribal-state gaming compact without legislative ratification violated Const 1963, art 3, §2. This Court directed the parties to brief whether the Governor's efforts to unilaterally execute an amended tribal-state gaming compact violates the Separation of Powers Clause of Const 1963, art 3, § 2.

This issue was thrust upon this Court by certain actions taken by the Governor *after* the Court of Appeals' initial ruling in this case. Specifically, the Governor entered into negotiations with, and on July 22, 2003, signed an amendatory tribal-state agreement with, one of the tribes involved in this litigation. The Governor has asserted that her unilateral execution of that agreement amended the pre-existing tribal-state gaming compact and binds the State to the terms she negotiated -- without legislative ratification.

The *amici curiae* assert that while the Governor may have the power to negotiate the terms of a tribal-state gaming compact, the Governor does not have the power to bind the State to the resulting terms of a compact absent an express constitutional delegation of legislative approval authority under Const 1963, art 3, § 2.

The trial court previously ruled in this matter that the amendatory mechanism contained in the subject tribal-state gaming compacts violated the Separation of Powers Clause of Const 1963, art 3, § 2. On initial review, the Michigan Court of Appeals held on November 12, 2002, that at that time the issue was not yet ripe for review because such an amendment had not yet been attempted. Subsequent to that initial ruling of the Court of Appeals, the Governor attempted to amend a tribal-state gaming compact and claimed the State was bound to the terms and conditions she had negotiated.

On July 30, 2004, this Supreme Court decided the underlying issue in this dispute (that a legislative resolution was an effective means of ratifying the original compacts) and remanded the case back to the Court of Appeals to decide the constitutionality of the Governor's attempted unilateral amendment of the compact -- without legislative approval. After careful analysis of the arguments from both parties, the Court of Appeals ruled on September 22, 2005, that the Governor's attempt to unilaterally amend the tribal-state gaming compact violated the Separation of Powers Clause of Const 1963 art 3, § 2. The review of that decision is now before this Court.

The *amici curiae* assert that absent a proper delegation of legislative authority to the Governor through a specific provision of the Constitution, the Governor is not empowered to bind the State to the resulting terms of any tribal-state gaming compact or amendment to a compact. The absence of an express constitutional delegation of legislative authority in the present case renders the Governor's actions in violation of Const 1963, art 3, § 2.

Even if one were to assume for the sake of argument that the Governor could constitutionally amend a tribal-state gaming compact without legislative ratification, the manner in which the Governor attempted to exercise such power in this case violated Const 1963 art 9, § 17. The *amicus curiae* draw the Court's attention to the undeniably corrosive effect the

Governor's actions have on the Legislature's power to appropriate state funds under Const 1963, art 9, § 17. The amendment crafted by the Governor directs tribal payments be made not to the Michigan Strategic Fund (MSF) as provided for in the original compact but "to the State, *as directed by the Governor.*" Presumably, this payment mechanism was intended to be used as a means of insulating those revenues from legislative oversight. The *amici curiae* believe this modification to the compact impinges upon the Legislature's unique power to appropriate *all* State funds in violation of Const 1963, art 9, § 17.

The *amici curiae* possess a strong interest in preserving and protecting the powers of the Michigan Legislature as set forth in the Michigan Constitution. The powers of government emanate from the people and are carefully apportioned by the Constitution into three distinct branches so as to prevent any one branch from exercising the power of another unless the Constitution *expressly* so provides.

The *amici curiae* are gravely concerned that the actions undertaken by the Governor in this matter constitute *ultra vires* activities in violation of the Michigan Constitution and believe that this Court's resolution of these issues is needed to avoid repeated violations of Const 1963, art 3 § 2 and art 9, § 17.

The Administration has indicated its intentions to use this amendatory agreement as a model for executing amendatory agreements with other tribes. The *amici curiae* are concerned that if this amendatory agreement is not invalidated by this Court, the agreement and the process the Governor used to create it may serve as a model for the Administration in fashioning other efforts which could further erode the proper separation between the three branches of government. The potential impact of this dispute is enormous and extends *far* beyond the scope of the tribal-state gaming compacts.

In addition, the *amici curiae* request that this Court declare that the Governor's proposed payment terms violate Const 1963, Article 9, Section 17 because the terms of the agreement reflect an unconstitutional attempt to usurp the power of appropriation that is *exclusively* reserved to the Michigan Legislature under the Constitution.

The *amici curiae* assert that because a tribal-state gaming compact is deemed invalid under federal law if the State official(s) executing the agreement is not properly empowered to bind the State to the terms of the agreement, the purported amendatory agreement is a legal nullity.

The *amici curiae* respectfully request for all the reasons discussed, *infra,* that the Court declare that the Governor may not unilaterally bind the State to a tribal-state gaming compact or amendment and that any such agreement is null and void under Const 1963, art 3, § 2.

STATEMENT OF QUESTIONS PRESENTED

Should this Court rule that:

1. The Governor of Michigan may not unilaterally amend the terms of a tribal-state gaming compact previously agreed to by the Michigan Legislature where Article 3, Section 2 of the Michigan Constitution permits the delegation of such legislative authority *only if* it is specifically authorized by an *expressed provision* of the Constitution and no such express provision of the Constitution exists.

The Court of Appeals on remand held the answer is "YES."

The Plaintiffs-Appellants contend the answer should be "YES."

The Defendant-Appellees would presumably contend the answer should be "No."

The Amici Curiae contend the answer is "YES."

2. Even if it is assumed that the amendatory power was properly delegated to the Governor, the Governor's exercise of that power in crafting a tribal gaming payment mechanism that directs that tribal payments shall be *"paid to the State as the Governor so directs"* violates the Appropriations Clause of Article 9, Section 17 of the Michigan Constitution and corresponding statutes because it represents an improper attempt by the Governor to exercise power that Article 9, Section 17 exclusively reserves to the Michigan Legislature.

The Court of Appeals did not decide this issue.

The Plaintiffs-Appellants would presumably contend the answer should be "YES."

The Defendant-Appellees would presumably contend the answer should be "No."

The Amici Curiae contend the answer is "YES."

3. Because the Governor was not properly empowered by state law to amend the compact without legislative approval, the amendatory agreement is void as a matter of law under the federal Indian Gaming Regulatory Act of 1988, and the previous compact continues in effect.

The Court of Appeals did not decide this specific issue.

The Plaintiffs-Appellants would presumably contend the answer should be "YES."

The Defendant-Appellees would presumably contend the answer should be "No."

The Amici Curiae contend the answer is "YES."

BRIEF IN SUPPORT OF MOTION TO FILE BRIEF OF AMICI CURIAE

Amici Curiae submit this brief in support of their motion to file a brief in this matter as this proceeding implicates fundamental constitutional questions of great public importance. Final resolution of this dispute is desirable to prevent confusion and uncertainty as to the proper constitutional role(s) of the Governor and the Michigan Legislature in formulating the State's public policy on tribal gaming and binding the State to the terms of tribal-state agreements and to ensure that any State revenues generated from tribal gaming are expended by the State in conformity with applicable constitutional and statutory appropriation proscriptions. Because the Governor has indicated her intentions to use this purported agreement as a model to amend existing compacts with other Michigan tribes to expand gaming in the state, the *amici curiae* assert it is critical that the issue be resolved now to prevent future uncertainty and confusion regarding the proper delegation of authority between the Legislative and Executive Branches of State government under Article 3, Section 2 and Article 9, Section 17 of the Michigan Constitution.

STATEMENT OF FACTS

Throughout the late 1980s and the early 1990s, federally recognized Indian tribes in Michigan negotiated with the State to enter into gaming compacts in accordance with the federal Indian Gaming Regulatory Act of 1988 (IGRA), 25 USC Section 2701 et seq. Congress enacted the IGRA to create a framework within which federally recognized Indian tribes could operate casino-style gaming activities.

In 1993, seven Michigan tribes (the Sault Ste. Marie Band of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Hannahville Indian Community, the Bay Mills Indian Community, and the Lac Vieux Desert Band of Lake Superior Chippewa Indians) that had previously sued the State for the right to operate gaming activities entered into a Consent Judgment dismissing the suit in exchange for Class III gaming compacts under the IGRA.

On December 11, 1998, the Michigan Legislature adopted a concurrent resolution approving compacts with four more tribes -- the Huron Band of Potawatomi Indians, the Little River Band of Ottawa Indians, the Little Traverse Bay Band of Odawa Indians, and the Pokagon Band of Potawatomi Indians -- that had received federal recognition after the date that the 1993 compacts were approved by the Michigan Legislature. The 1998 compacts -- including the original compact with the Odawa Tribe -- mirrored the original seven compacts implemented in 1993 with the following exceptions of particular note:

- The 1998 compacts limit the four tribes to *one* casino on their tribal lands;
- The four 1998 tribes are required to continue to pay 8 percent of the net wins to the Michigan Strategic Fund (MSF) so long as no change in state law permits the operation of electronic games of chance beyond that already allowed for the three Detroit casinos; and

- The Governor, "acting for the state," was authorized to submit compact amendments for consideration to the tribes and receive proposed amendments from the tribe.

Both the 1993 compacts and the 1998 compacts were ratified by the Michigan Legislature through concurrent resolutions. The Attorney General ruled in OAG, 1997, No 6960 (including a peculiar "Clarification" contained in a press release issued a few days later) that the 1988 Compacts and any future compacts in Michigan must be approved via legislation.

The current lawsuit was then filed challenging the use of a resolution as a proper means of the Legislature approving the negotiated tribal gaming compacts. An additional issue argued at the trial level in this matter was whether the amendatory mechanism of the tribal-state compacts violated the Separation of Powers Clause of Const 1963, art 3, § 2. The trial court ruled that the amendatory language did violate the Separation of Powers Clause, but the Michigan Court of Appeals later ruled that the issue was not yet ripe for review because no amendment had yet been attempted. *Taxpayers of Michigan Against Casinos v Michigan*, 254 Mich App 23, 43-49; 657 NW2d 503 (2002).

In July 2003 -- nearly one year to the date of this Supreme Court's July 30, 2004, ruling in the case -- the Governor negotiated an amendment to the 1993 compact with the Odawa Tribe. Unlike previous processes for negotiating and ratifying the tribal-gaming negotiations that took place in 1993 and 1998, Governor Granholm did not seek legislative ratification of her purported amendment of the agreement. Instead, she claimed the unilateral authority to bind the State to the agreement she alone negotiated.

The July 22, 2003, agreement between the Governor and the Odawa Tribe states that the Tribe could operate a second casino in the Mackinaw City area in addition to its "Victories Casino" located just south of Petoskey.

The proposed amendatory agreement would also make the following substantive changes to the Tribe's 1998 Compact with the State:

- ***Extends the term*** of the Compact from 20 to 25 years.
- ***Provides less restrictive limitations on gaming*** by requiring the Tribe to make semi-annual payments to the State, but now only so long as the State does not authorize new gaming in ten specified counties (Emmet, Cheboygan, Charlevoix, Antrim, Otsego, Crawford, Kalkaska, Presque Isle, Montmorency, and Oscoda) rather than the statewide limitation required under the 1998 Compact.
- Requires semi-annual payments are to be made to the State ***"as the Governor so directs"*** -- rather than to the MSF.
- Increases percentage used in determining the semi-annual payment amounts at the second site from a flat 8 percent of the net win from all Class III electronic games of chance at the existing casino to 10 percent of the first $50 million and 12 percent of any amount over $50 million from these sources at the new facility.

The Governor's actions in crafting that "agreement" prompted the *amici curiae* to submit a brief in this matter on October 16, 2003. The *amici curiae'* purpose in filing their brief today is the same as that of their original brief -- to draw this Court's attention to the critical issue of whether the Governor's attempt to unilaterally bind the state to a tribal gaming agreement violates the Michigan Constitution.

On July 30, 2004, this Supreme Court ruled that legislative approval of the gambling compacts by adoption of a resolution rather than the enactment of legislation did not violate the Michigan Constitution. *Taxpayers of Michigan Against Casinos v Michigan,* 471 Mich at 327-328, 352; 685 NW2d 221 (2004). In writing the majority opinion for the Court, Chief Justice

Corrigan noted that the issue of the Governor's attempt to unilaterally amend the tribal gaming compacts *"may now be ripe for review."* *Id.* at 313.

This Court remanded the case to the Court of Appeals "to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violated the separation of powers doctrine found in Const 1963, art 3, § 2." *Id.* at 333.

In November 2004, the Court of Appeals issued an order directing the parties to address:

> "(1) Whether the provision in the tribal state gaming compact of the Little Traverse Bay Nab[sic] of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, sec 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violates the separation of powers clause, Const 1963, art 3, sec 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause."

On September 22, 2005, the Court of Appeals ruled on remand that under the facts of the case, Const 1963, art 3, § 2 was violated. This Court granted three leaves to appeal the decision of the Court of Appeals on March 29, 2006. The *amici curiae* file this brief challenging the constitutionality of the Governor's attempt to unilaterally rewrite the tribal-state gaming compacts and bind the State thereto under Const 1963, art 3, § 2, and Const 1963, art 9, § 17.

INTRODUCTION AND SUMMARY OF ARGUMENT

For public officials facing tough budgetary decisions, amending the tribal-state gaming compacts to increase tribal payments to the State may appear to be a minimally offensive response to an otherwise overwhelming problem. In an apparent response to such concerns, the Governor signed the July 22, 2003, amendatory agreement with the Odawa Tribe. The agreement is purportedly based on the provisions of the 1998 Compact which state the Governor may *"act on behalf of the state"* in negotiating amendments to the agreement. While the Administration may have viewed this course of action as politically expedient, the amendatory agreement arrived at is void under Michigan law.

The Administration asserts no formal action by the Legislature was needed to validate the agreement because the Legislature previously delegated its approval authority to the Governor through its concurrence in the 1998 compacts. While the legislative approval of the 1998 compacts was previously determined by this Court to be a contractual function capable of approval by resolution, the *delegation of legislative authority* to approve compacts and amendments to compacts is *not* a contractual issue. It is instead a constitutional issue. One involving the improper exercise of constitutionally prescribed *legislative* authority by a separate branch of government.

Article 3, Section 2 of the Michigan Constitution divides the power of government into three branches of government and provides that *no* person exercising the powers of one branch can exercise the powers properly belonging to another branch except as expressly authorized in the Constitution. While the lines separating the three branches of government may appear to converge, they are distinct boundaries. *No* person in the Executive Branch can exercise a legislative function unless expressly provided for in the Constitution. *No* provision of the

Michigan Constitution delegates the legislative approval authority over compact amendments to the Governor.

Even if one were to assume that the Governor was properly empowered by the Constitution to unilaterally bind the State to such an agreement, the ***manner*** in which the Governor exercised such power in this matter violated the Michigan Constitution. The purported agreement crafted by the Governor would require the tribe to make semi-annual payments to "the state" *"as the Governor so directs."* This language reflects an obvious attempt by the Governor to circumvent and usurp the power of appropriation exclusively reserved to the Legislature by Article 9, Section 17.

The potential harm to our representative form of government caused by these *"ultra vires"* actions by the Governor is immeasurable. The Administration has indicated its intention to use this agreement as a model for negotiating future agreements with three other tribes that operate casinos pursuant to the 1998 compacts. If the Governor's actions are allowed to proceed, what impact would that have on the constitutional safeguards intended to guard against future abuses of Article 3, Section 2?

The Governor believes the amendatory agreement, having been approved by the Tribe and by the Governor without any action by the Michigan Legislature, need only be submitted to and approved by the Secretary of the Interior and published in the Federal Register to become effective under 25 USC 2710(d).

The Administration further asserts that the Governor's actions were warranted by Section 16 of the original compact, which sets forth the amendatory procedure to be followed and states that the compact may be amended by mutual agreement between the Tribe and the **State** as follows:

> "The Tribe or the **State** may propose amendments to the Compact by providing the other party with written notice of the proposed amendments as follows: The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to *the Governor who shall act for the* ***State.*** *The* ***State,*** *acting through the Governor*, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact." (Emphasis added)

The 1998 Compact does not state that the Legislature delegated its ability to approve future compact amendments and, thus, retained no role in approving future compact amendments. A fair reading of the compact indicates the terms "state" and "governor" are not synonymous; rather, the Governor's chief role is to *"act for"* the State in proposing and receiving amendments. This is the same role the Governor played in negotiating the 1993 and 1998 compacts -- *prior* to submitting the negotiated compacts to the Michigan Legislature for subsequent approval.

Even if the compact expressly provided that the Legislature delegated such power to the Governor, such language would be unconstitutional. The Separation of Powers Clause of the Michigan Constitution provides that such a delegation can take place *only if* it is specifically authorized by an *express* provision of the Constitution. The Constitution contains no such provision, and the Governor's attempted exercise of such authority in the absence of such authority violates Article 3, Section 2.

In addition, even if the Governor was properly empowered to unilaterally bind the state to an amendatory agreement she had negotiated, the manner in which she chose to exercise that power in the present case violated the clear mandates of Article 9, Section 17, and MCL 21.161. The *"agreement"* the Governor crafted states that revenue from the second casino shall be distributed *"as directed by the Governor or designee."* This payment mechanism would insulate the distribution of such revenue from any oversight by the Legislature despite the fact that the

money is to be paid "to the State" and, as such, would be deposited into the State Treasury. This attempt to provide *"the Governor or designee"* with unfettered discretion in directing the disbursement of those funds violates Article 9, Section 17 of the Michigan Constitution, which provides *no* money may be paid out of the State Treasury except in pursuance of appropriations made *by law*.

Together, these factors demonstrate the lack of proper constitutional and statutory authority for the Governor to execute the amendatory agreement without the approval of the Michigan Legislature. Because the Governor did not possess the requisite authority to bind the State to the compact, the amended compact in this case is void *as a matter of law*.

ARGUMENT

I. THE GOVERNOR'S ATTEMPT TO UNILATERALLY AMEND THE TRIBAL GAMING COMPACT WITH THE ODAWA TRIBE VIOLATES THE SEPARATION OF POWERS CLAUSE OF THE MICHIGAN CONSTITUTION.

A. The Separation of Powers Clause of the Michigan Constitution.

The Michigan Constitution vests the legislative power of the State in the Michigan Senate and House of Representatives, Const 1963, Article 4, Section 1, and vests the Executive power in the Governor, Const 1963, art 5, § 1. Article 3, Section 2 establishes the boundaries for the three branches of state government and expressly provides that one branch of state government cannot exercise the duties of another unless the Constitution expressly so provides:

> "Sec.2. The powers of government are divided into three branches; legislative, executive and judicial. **No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.**" Const 1963, art 3, § 2. (Emphasis added)

This provision of Michigan's highest law reflects a principle that is fundamental in the structure of the federal government and the governments of all 50 states. The Separation of Powers Clause rests on the notion that the accumulation of too much power in one governmental entity presents a threat to liberty. *State ex rel Clark v Johnson*, 120 NM 562, at 573; 904 P2d 11 (1995), citing: *Gregory v Ashcroft*, 501 US 452, 459 (1991).

On remand, the Court of Appeals in this matter quoted the following as a fitting summary of the policy behind the doctrine:

> "Our government is one whose powers have been carefully apportioned between three distinct departments . . . This division is accepted as a necessity in all free governments and **the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.**" *Taxpayers (On Remand), supra* at 240. (Emphasis added)

This Court has staunchly maintained the fundamental purpose of the doctrine. In *Judicial Attorneys Association* v *Michigan*, 459 Mich 291; 586 NW2d 894 (1998), this Court stated that "the doctrine of separation of powers" is a shield for each of the branches of government to use for the protection of our form of government and for the people it serves; it is not a sword to be used by one branch against another." *Id.* at 304. This Court has also recognized that the intent of the doctrine was not that each branch be kept completely distinct and separate from the other branches. However, the purpose of the doctrine is to guard against the danger that the power of one department could exercise the power of either of the other departments. *In re Southard*, 298 Mich 75, 82-83; 298 NW 457 (1941).

As the Court of Appeals recognized below:

> "The Governor's responsibility is to exercise the executive power, Const 1963, art 5, sec 1, including the power to suggest legislation, Const 1963, art 5, sec 17. The responsibilities entrusted to the executive branch of government are set forth in Const 1963, art 5, sec 8. . . . Of significance in this constitutional provision is the specific, stated responsibility of the Governor to faithfully execute laws. Conspicuously absent is **any** reference whatsoever granting the executive branch any authority to assume any legislative role. While the Constitution provides the Governor the right to suggest legislation, it neither confers nor implies any power on the Governor to invade, supersede, or assume powers conferred on the Legislature." *Taxpayers of Michigan Against Casinos v Michigan (On Remand)*, 268 Mich App 226, 238-39; 708 NW2d 115 (2005). (Emphasis added)

Both the Tribe and Administration claim that by adopting the original compact in 1998, the Legislature had thereby adopted any future amendments thereto. This claim is unsupported by the law. As the Court of Appeals pointed out below, *each* of the cases cited by those parties in support of their claim was factually dissimilar from the case at bar in one critical element. Unlike the present dispute, in *each* of those cases, the Legislature had authorized other bodies to make binding contracts. Such authorization was evidenced by either a requisite delegation of legislative authority by statute or by a constitutional provision.

As this Court held in *Roxborough v Michigan Unemployment Compensation Commission*, 309 Mich 505; 15 NW2d 724 (1944):

> "Public officers have and can exercise only such powers as are conferred on them by law, and a **state is not bound to contracts made in its behalf by its officers or agents without previous authority conferred by statute or the Constitution**. *Id.* at 510.

The Court of Appeals held in the case below:

> The rule from *Roxborough* is essentially that "[g]enerally, **only persons authorized by the state constitution or a statute can make a contract binding on a state. . . .**" *Taxpayers (On Remand), supra* at 241. (Emphasis added)

The lack of such proper delegation in the present matter was cited by the Court of Appeals as controlling evidence that the adoption of the compact via resolution rather than statute failed the *Roxborough* test: "The non-statutory nature of the 1998 resolution between the State and the Tribe fails the *Roxborough* requirement that stipulates a valid delegation of legislative authority to the executive branch must be expressed in the Michigan Constitution or by means of a statute." *Id.*

Citing previous court rulings establishing the legal limits of the Governor to negotiate the proposed terms of a tribal gaming compact *McCartney v Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998), citing *Tiger Stadium Fan Club Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996) the Court of Appeals held below:

> "[T]here is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his negotiations has no effect **without legislative approval**"; *McCartney, supra* at 729. (Emphasis added)

With this as a legal framework, the Court of Appeals concluded:

> "The rule of law in Michigan has been enunciated in *Taxpayers*, in which our Supreme Court . . . held that the Governor may contract with a tribe to establish the ground rules pertaining to casino gambling. The ground rules, set forth in contract, must be presented to the Legislature for approval, at the very least by legislative resolution. Here no party has identified any statutory or constitutional authorization for the Governor to enter into compacts or amendments to compacts that are not subject to

legislative approval. **Thus while the Supreme Court in Taxpayers held that the Governor could negotiate the gambling compact subject to legislative approval by resolution, we hold that the Governor does not have unbridled authority to amend a compact.**" *Taxpayers (On Remand), supra* at 242. (Emphasis added)

The Governor may serve as the State's point of contact with tribal leaders in negotiating the terms and conditions of a tribal-state gaming compact and any amendment to that contract. The exercise of that limited power is consistent with this Court's prior decision in this matter. But purporting to act on behalf of the State and unilaterally bind the State to agreements or amendments to agreements is not. There is no grant of authority to support such action(s) by the Governor. *All* of the cases cited by the Tribe and that state in support of the Governor's actions have had "*the embedded premise of a statutory or constitutional delegation*" of authority to the Governor. *Id.* at 243. No such delegation of authority has been cited by the parties in the present case because none exists.

No constitutional provision or statutory enactment purportedly provides the Governor the unilateral authority to amend a tribal-state gaming compact and bind the State. Those supporting the Governor's actions in this dispute can point only to a strained interpretation of the amendatory provision of the Compact that was later ratified through the adoption of a legislative *resolution*. Even if the Compact language supported the Governor's claim, however, the lack of constitutional or statutory delegation to support the challenged actions causes the Governor's claim to fail the *Roxborough* test.

B. There has been No Constitutional Delegation as Needed to Satisfy Article 3, Section 2.

Article 3, Section 2, is not violated when the Constitution expressly grants the powers of one branch of government to another branch. In *Soap & Detergent Association* v *Natural Resources Commission*, 415 Mich 728; 330 NW2d 346 (1982), this Court acknowledged that

Article 5, Section 2 of the Michigan Constitution specifically delegates broad legislative power to the Governor for the purpose of Executive reorganization. However, this Court also recognized that this delegation of legislative power was limited and specific because the Legislature continues to hold the power to transfer functions and powers of the Executive agencies and because the Legislature specifically maintains veto power over Executive reorganization orders. *Id.* at 752.

Similarly, in *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993), this Court again recognized that any legislative power held by the Governor must be expressly granted to the Governor by the Constitution. According to the Court in that case, the obvious meaning and common understanding of Article 5, Section 2, expressly granted to the Governor the legislative authority to promote an efficient Executive department. *Id.* at 578. Further, the Court ruled that where such power is expressly provided for, there is no need for enabling legislation. *Id.* at 590. Thus, when the Constitution expressly grants the Governor legislative authority, the exercise of that authority is respected.

Unlike the *express* grant of power provision in Article 5, Section 2, in the cases of *Soap & Detergent Association* and *House Speaker*, *supra,* however, the Governor in the instant case can point to ***no*** express constitutional provision authorizing the Governor to act alone to amend the 1998 Compact. Instead, the Administration can point only to a portion of the 1998 Gaming Compact which outlines the process for completing compact amendments. This particular section of the Compact, however, states that the Governor may *"act on behalf of the state"* in receiving and transmitting proposed Compact amendments. It does *not* substitute the Governor for the State as the proper party to the Compact.

The amendatory mechanism contains *no* express delegation of legislative approval authority over future proposed amendments. This is evident from the distinct use of the term "State" in the section of the Compact as the contracting party and the designation of the Governor as a conduit of information for the State. Nowhere does this section state that the Governor may act alone to bind the State:

> **"SECTION 16. Amendment.**
>
> (A) This Compact may be amended by mutual agreement between the Tribe and the **State** as follows:
>
> The Tribe or the **State** may propose amendments to the Compact by providing the other party with written notice of the proposed amendments as follows:
>
> The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the **State.**
>
> The **State,** acting through the Governor, shall propose amendments by submitting the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.
>
> (i) Neither the tribe nor the **State** may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. The Tribe's right to conduct gaming under this Compact shall be terminated if any of the following events occur:
>
> (I) the Tribe applies to the United States Department of Interior to have land taken in trust which would qualify for gaming under Section 20 of IGRA (25 U.S.C. Section 2719) and which is within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(I) of this Compact,
>
> (II) the Tribe requests the United States Department of Interior to approve a Compact for gaming within 150 miles of the City of Detroit which Compact has not been executed by the **State of Michigan**, or
>
> (III) the Tribe conducts gaming on land within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(I) of this Compact.
>
> Termination of tribal gaming under this Section shall be effective as of the date on which the **State** learns or receives notice of any tribal action identified in this Paragraph 16(A)(iii), including notice from any person or entity (including any unit of government) which is given to the addresses identified in Section 13 of this Compact.

(B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:

(i) That the receiving party agrees to the proposed amendment; or
(ii) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the provisions of the IGRA.

(C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.

(D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan legislature and the Michigan Attorney General." (Emphasis added)

The Administration believes the Legislature previously delegated its approval authority to the Governor through its concurrence in the 1998 Compact. This strained interpretation of the 1998 agreement is fundamentally flawed. Not only does the Administration's claim ignore the expressed mandates of Article 3, Section 2, as articulated in *House Speaker*, *supra*, but it also ignores the indisputable truth that the expressed language of Section 16 of the Compact specifically describes the parties to the agreement as the ***State*** and the Tribe -- *not* the Governor and the Tribe.

The Legislature and the Governor -- *acting together* -- constituted the "State" under the 1998 Compact and continue to constitute the "State" today. Nowhere does the compact define the Governor as the "State" for purposes of exercising such approval power. Yet, even if the two terms were deemed synonymous under the compacts, the Compact cannot legally delegate legislative authority to the Governor in the absence of an express constitutional and/or statutory grant of authority.

Nothing in the Compact's amendment mechanism provides the Governor an express *"specific delegation"* of legislative authority to unilaterally bind the State to a new agreement; nor can such an interpretation be inferred.

The term *"Governor"* is used in Section 16 of the Compact to designate the Governor as the State's contact person for submitting and receiving proposed amendments for the State. This reading is consistent with the past practice of the Michigan Legislature and the previous Governor in negotiating the terms of the original compacts on behalf of the State prior to submission for legislative approval. A fair reading of Section 16 indicates the language contained therein constitutes a logistical designation of the Governor as the proper party to receive and submit amendment proposals on behalf of the State, given the practical and logistical realities of tribal-state gaming compact negotiations.

To act *"on behalf of the State"* in proposing or receiving amendments to gaming compacts neither specifically nor implicitly authorizes the Governor to exclude the Legislature -- an otherwise necessary party to the original agreement -- from taking part in the approval of any amendment(s) to the Compact.

As the Court of Appeals below recognized: "[A]bsent a statutory delegation of authority by the Legislature to the Governor to amend a gambling compact, and being mindful of the constitutional prohibition that forbids the executive branch from assuming the duties of the legislative branch unless expressly provided for in the Michigan Constitution any amendment to a gaming compact must be presented to the Legislature for approval, at the very least by legislative resolution." *Taxpayers (On Remand), supra* at 242.

Each case cited by the parties in support of the Governor's actions is distinguishable from the present dispute. In each case upholding the propriety of the Executive Branch's exercise of a challenged power, the challenged power had been conferred on the Executive by the Michigan Constitution or statute. The present matter involves the Governor's attempt to exercise a power

that was neither granted by express constitutional right nor an appropriate delegation of power by the State Legislature.

The process for amending the compacts is simply established in a contract that was previously adopted by resolution -- ***not*** an enacted law. The legal and practical distinctions between a legislative resolution and an enacted law have been the primary subject of this litigation over the past several years, and the *amici curiae* will not attempt to restate matters of which this Court is well aware. Suffice to say that the distinction between a statutory enactment and a legislative resolution are not insignificant.

While the Court of Appeals did not directly address the issue on remand, a fair reading of the 1998 Compact reveals that it does not expressly preclude the Legislature from taking part in the approval of any compact amendments, nor should any such preclusion be inferred. It is counterintuitive to assert that the same parties to the 1998 Compact -- the Governor, the Legislature, and the Tribe -- who are necessary to execute a compact are not the same parties necessary to amend the Compact. It is inconsistent with the basic principles of contract law that provide that any contract, or any amendment to a contract, requires the mutual assent of all the necessary parties to the underlying agreement.

By attempting to unilaterally amend the Compact, the Governor has violated the Separation of Powers Clause because no express constitutional authority exists to specifically authorize the delegation of legislative authority to her that would exclusively determine the State's public policy on tribal gaming policy. While acknowledging that the Doctrine permits some overlap in functions between the three branches of government, the delegation of power *must* be specific and limited. While the Legislature authorized the Governor to accept and transmit proposed amendments to the 1998 Compact on behalf of the State, it did not delegate its

legislative authority to the Governor to bind the State to proposed amendments through its previous adoption of a resolution. The lack of such authority renders the Governor's action *ultra vires* and the purported amendatory agreement a legal nullity.

C. IGRA Case Law Validates the Need for a Specific Delegation of Authority.

The provisions of IGRA neither add nor detract from a State official's authority under state law. The provision of IGRA which authorizes State officials to enter into tribal-state gaming compacts on behalf of the State does not invest state governors with powers in excess of those that governors otherwise possess under state law. If those constitutional and statutory provisions do not authorize a governor to unilaterally enter into such compacts without express legislative approval, then the compacts executed by a governor in the absence of such state authority are without legal effect and cannot be implemented. *Clark, supra.*

A line of cases from courts in other states reaffirms the general rule that while a governor may have the power to negotiate the terms of a gaming compact with an Indian tribe under the IGRA, a governor cannot bind the State to the resulting terms of any compact absent an express or implied state constitutional right or an appropriate delegation of power by the state legislature. See e.g., *State ex rel Stephan v Finney*, 254 Kan 632; 867 P2d 1034 (1994); *State ex rel Clark v Johnson*, 120 NM 562, 904 P2d 11(1995); *Narragansett Indian Tribe of Rhode Island v State*, 667 A2d 280 (1995).

In prohibiting the governor from implementing gaming compacts and revenue sharing agreements entered into without legislative approval under a nearly identical constitutional provision, the New Mexico Supreme Court held in *Clark, supra*, that:

> "[T]he Governor may not exercise the power that as a matter of state constitutional law infringes upon the power properly belonging to the legislature [and that] the test [of constitutionality of such actions] is whether the Governor's

> actions disrupt the proper balance between the executive and legislative branches [and further that]. . . **We also find the Governors actions to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the State and the Tribe** in such important matters as the regulation of Class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations. **All of this occurred in the absence of any action on the part of the legislature.** While negotiations between states and Indian tribes to address these matters is expressly contemplated under the IGRA [citations omitted], we think the actual balance that is struck represents a legislative function. While the legislature might authorize the Governor to enter into a Gaming compact or ratify his actions with respect to a compact he has negotiated, **the Governor cannot enter into such a compact solely on his own authority.**" *Id.* at 573-74. (Emphasis added)

Thus, in some states, the governors may finally execute and bind a state to a tribal gaming compact based on an appropriate delegation of authority by the state legislature. However, that scenario is **not** possible in Michigan. Article 3, Section 2 of the Michigan Constitution permits the delegation of such legislative authority only if it is specifically authorized by an express provision of the Constitution.

D. Residual Constitutional Authority Resides in the Michigan Legislature.

It is a generally recognized principle of law that residual legislative governmental authority rests with the Legislative Branch rather than the Executive Branch. Any legislative power that the Governor possesses must be expressly granted to him by the constitution. Mich. Const. 1963, art 3, § 2.

So it is that the original Compact adopted by the Michigan Legislature reflected a specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, the regulation of alcoholic beverages, imposition of age requirements for participation in gaming activities, revenue payments, and the respective civil and criminal jurisdictions for the State and the Tribe necessary

for the enforcement of state or tribal laws or regulations. The Legislature's ability to give input and make policy determinations with respect to these considerations would be summarily negated if the Administration's interpretation is permitted to stand.

As the Court of Appeals has previously noted in this case: "*The Governor is constitutionally authorized to present and recommend legislation . . . . There is no prohibition in Michigan law that would bar the Governor's actions in negotiating a gaming compact and then presenting it to the Legislature.*" *Taxpayers, supra* at 40.

Similarly, the Court of Appeals acknowledged in *Tiger Stadium Fan Club, Inc v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), that the Governor has the constitutional ability to enter into compacts with Indian tribes, *subject to the approval of the Michigan Legislature*.

In the present matter, the Governor has not sought to merely negotiate the purported agreement prior to submission to the Michigan Legislature. Instead, the Governor has sought to expand the scope of her constitutional authority by attempting to bind the State of Michigan to the terms of an agreement she alone negotiated, and one which she never submitted for legislative approval. Such an overt act in the absence of a specific grant of constitutional authority or proper legislative enactment constitutes *ultra vires* activities under Michigan law.

The Michigan Constitution contains no provision -- implicit or expressed -- authorizing the delegation of legislative authority over tribal-state gaming compact approval to the Executive Branch. Nor does Michigan law contain a statutory enactment promulgated under an implied constitutional grant of authority that arguably does this. Contractual language (even if it supported the Governor's position) is no substitute for the requisite constitutional or statutory grant of authority.

Under the law of Michigan, the Governor alone cannot bind the State of Michigan in the manner attempted here. The purported amendatory agreement is therefore ineffective as required by section 2710 of the IGRA *unless and until* it is approved by the Michigan Legislature.

Cases from other jurisdictions addressing this precise issue have reached similar results. This line of cases distinguishes between a governor's ability to negotiate gaming compacts with Indian tribes versus the heightened constitutional authority needed to bind the State. For example, in *State ex rel Stephan v Finney*, 254 Kan 632, 635; 867 P2d 1034 (1994), the Court held that while a governor may negotiate the terms of a proposed agreement, absent "an appropriate delegation of power" by the state legislature, the governor had "no power to bind the State to the terms" of the compact. Similarly, in *Clark, supra*, the Court held that the governor lacked the constitutional authority to unilaterally bind the State to a compact negotiated by him.

E. The Governor's Actions Violate Article 3, Section 2.

Amici Curiae recognize the Governor may advocate, initiate, negotiate, and take any other action, short of executing, a tribal-state gaming compact. Indeed, requiring legislative approval of negotiated compacts has been the established practice in this state up until the current attempt by the Administration to usurp the Legislature's approval authority. The 1998 Compact specifically authorizes the Governor to sign the compacts which she negotiates without subsequent legislative approval. While the Court of Appeals did not address the issue on remand, a fair reading of that document reveals that nothing in the Compact authorizes the Governor to do anything that the previous administration had not done. More importantly, nothing in the Michigan Constitution expressly and specifically authorizes this unprecedented action by the Governor.

As the Court of Appeals decided in *McCartney v Attorney General*, 231 Mich App 722, 726-28; 587 NW2d 824 (1998), the previous Governor's unilateral actions were not *ultra vires* where he *"did not attempt to bind the Legislature or the state to any terms in the compact"* which he had negotiated. Accordingly, it is the current Governor's unilateral efforts to bind the State to the terms of an amendatory compact which she has negotiated that render the Governor's actions *ultra vires*.

The delegation of legislative authority is permitted under Article 3, Section 2 *only if* it is specifically authorized by an *express* provision of the Constitution. Yet, the Michigan Constitution contains no provision -- implicit or expressed -- permitting the type of delegation the Governor relies upon to authorize her unprecedented action. Even if the Constitution *"implicitly"* authorized this action by the Governor, there is no statutory delegation of this authority under Article 3, Section 2 as required by *Roxborough* and its progeny. The Governor's attempt to exercise such authority in the absence of an expressed grant of constitutional authority, therefore, violates Article 3, Section 2.

II. EVEN IF THE GOVERNOR WAS EMPOWERED TO UNILATERALLY AMEND THE TRIBAL-STATE GAMING COMPACT, THE MANNER IN WHICH SHE EXERCISED THAT POWER VIOLATED MICHIGAN CONSTITUTIONAL AND STATUTORY APPROPRIATIONS PROVISIONS.

The proposed amendatory agreement negotiated by the Governor with the Tribe purports to amend Section 17(C) of the Compact to provide that the Tribe's semi-annual payments to the State from its winnings at *both* casinos would no longer be made *"to the Michigan Strategic Fund, or its successor as determined by State law"* but rather *"to the State,* **as directed by the Governor or designee** . . . ." The Governor's attempted diversion of these funds clearly runs afoul of Michigan's constitutional and statutory proscriptions on State expenditures.

The rule of law in Michigan requires that all "[r]eceipts of state government **from whatever source derived shall be deposited** pursuant to directives issued by the state treasurer and credited to the proper fund." MCL 18.1441 (Emphasis added) The Constitution further requires that:

> Sec. 17 **No money** *shall be paid out of the state treasury except in pursuance of* **appropriations made by law**. Const 1963, art 9, § 17 (Emphasis added)

The Michigan Supreme Court has emphasized that the Legislature is the constitutional body charged with making appropriations:

> "Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and **not to be surrendered or abridged, save by the constitution itself**, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system." *Civil Service Comm'n v Auditor General*, 302 Mich 673, 682; 5 NW2d 536 (1942) (citation omitted). (Emphasis added)

As the court in *Civil Service Commission* recognized, the "whole subject of finance . . . is placed by the Constitution of this state under the control of the Legislature." *Id.* at 684.

These constitutional and statutory provisions establish a general rule prohibiting State officials from directing the expenditure of State funds without proper legislative appropriation. The Michigan Attorney General, in OAG, 1953-1954, No 1835 (September 28, 1954), stated:

> "Payments from the general fund cannot be made except in accordance with legislative action. [citation omitted] . . . Except as restricted by the Constitution, the legislature has the **sole right and power** to appropriate money to the purposes which it deems best. **Desires and ideas of officials in the executive department of government may not prevail against a purpose prescribed by the legislature.**" *Id.* at 416-17. (Emphasis added)

The maxim presented in these materials is simple -- *only* the Legislature may appropriate State funds. The *"desires and ideas"* of the Governor -- that tribal gaming revenues to the State of Michigan should be distributed exclusively "*as the Governor so directs*" -- runs counter to the Legislature's constitutional prerogative and duty to appropriate *all* State funds by law in such a manner as the Legislature deems to be of most benefit to the State and its citizens.

The proposed amendment to Section 17(C) of the gaming compact with the Odawa Tribe contains no language to ensure the disbursements are made *"by law"* as required by Article 9, Section 17 and MCL 21.161. That statutory section provides:

> "Whenever *any* grant, devise, bequest, donation, gift or assignment of money, bonds or choses in action, or of any property, real or personal, shall be made to this state, the governor is hereby directed to receive and accept the same, so that the right and title to the same shall pass to this state; and all such bonds, notes or choses in action, or the proceeds thereof when collected, and all other property or thing of value, so received by the state as aforesaid, **shall be reported by the governor to the legislature**, *to the end that the same may be covered into the state treasury or appropriated to the State University, or to the public schools, or to such state charities as may be here after* **directed by law**. (Emphasis added)

The failure to abide by the mandates of Article 9, Section 17 and MCL 21.161 renders the amendatory agreement a legal nullity. No authority exists to empower the Governor to serve as the *sole* arbiter to determine where disbursements from the State Treasury should be directed; nor can any such power be granted from any legal authority, aside from an express provision of the Michigan Constitution. *Civil Service Comm'n v Auditor General, supra.* As no provision of the Constitution confers such authority, the Governor cannot claim the constitutional authority to direct the payment of State funds in the manner contemplated by the amendatory agreement.

This was not an issue under the original 1998 Compact because the original compact required that tribal payments to the State be deposited into the MSF (or successor fund) -- *not* the State Treasury -- and, therefore, were not subject to the appropriation process. No money can be

paid out of the State*Treasury* except in pursuance of appropriations made by law. This distinguishing characteristic is critically important. If money is not paid to the State, it is not deposited into the State Treasury. As the Michigan Court of Appeals held in the case of *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), the original deposit of gaming revenues into the MSF did not run afoul of Article 9, Section 17 because:

> "The payments here are gratuitous payments specifically **designated for the MSF not the state** . . . . We thus conclude that the revenues involved are public funds not subject to appropriation in that they are gratuitous payments negotiated by the Governor and **designated for a specific purpose** and that the payment of those revenues to, and their disbursement from, the MSF without an act of the Legislature does not violate the Appropriations Clause." *Id.* at 452-54. (Emphasis added)

The Michigan Court of Appeals *Tiger Stadium* decision made clear that funds which pass into the hands of a quasi corporation -- rather than to the State Treasury -- do not automatically become State funds subject to control by the Legislature. However, when such funds are paid to ***the State*** -- as the amendatory agreement provides -- and *not* to a public corporation, such funds *must* be appropriated by the Michigan Legislature.

This same distinction was reiterated by the Office of the Attorney General wherein the Attorney General opined that if it wishes to authorize the expenditure of donations to the State, the Legislature *must* appropriate such funds if they are to leave the State Treasury. OAG, 1977-1978, No 5393, p 693 (November 18, 1978).

The tribal payments at issue in the present case are clearly "*gratuitous payments*" under the holding in *Tiger Stadium, supra*. However, unlike the 1998 Compact, the amendatory agreement signed by the Governor on July 22, 2003, does *not* designate a specific destination such as the MSF but, rather, provides that tribal payments are to be made "*to the State*" for later disbursement as "*directed by the Governor.*"

In line with the court's decision in *Tiger Stadium, supra,* and the expressed provisions of MCL 21.161, the designation that those payments be made "to the State" subjects the disbursement of those revenues to an act of the Legislature under Article 9, Section 17 and MCL 21.161.

Published opinions of the Attorney General's office have also consistently recognized that *all* monies the State receives must be deposited into the State Treasury, to be appropriated by the Legislature in accordance with the law. For example, in OAG, 1977-1978, No 5393, p 693 (November 18, 1978), the Attorney General found that even grants and gifts to the State intended for a specific State fund may not be expended by any Executive Branch official, except pursuant to proper legislative appropriation prescribing the manner in which such funds are to be spent. Similarly, in OAG, 1983-1984, No 6119, p 14 (January 20, 1983), the Attorney General determined that a self-sustaining State fund, which had the power to make assessments against its members, could not disburse money it had raised to pay expenses without first having obtained a legislative appropriation as mandated by the Michigan Constitution. *Id.* at 15. (Citing numerous Attorney General Opinions).

In none of these opinions did the Attorney General recognize the propriety of a mechanism like the one contemplated in the case at bar where funds may simply be withdrawn from the State Treasury and expended by an Executive Branch official without any legislative direction or oversight. Attorney General opinions have consistently reflected the rationale that all moneys given to, or paid to, the State become State Treasury funds which may *only* be expended pursuant to legislative appropriations.

The Governor cannot avoid the mandates of Article 9, Section 17 and MCL 21.161 by attempting to contractually divert a portion of tribal-state gaming revenue to whatever purpose

she *"so directs."* Doing so may seem politically expedient, but it is also unconstitutional. The Legislature's power to appropriate State funds cannot be abridged *"save by the Constitution itself." Civil Service Comm'n v Auditor General, supra* at 682. The Governor's attempt to do so in the amendatory agreement violates the mandates of Article 9, Section 17 and MCL 21.161 and is therefore ineffective and a legal nullity.

III. BECAUSE THE GOVERNOR WAS NOT PROPERLY EMPOWERED TO AMEND THE COMPACT WITHOUT LEGISLATIVE APPROVAL, UNDER THE IGRA, THE AMENDED COMPACT IS VOID AS A MATTER OF LAW.

Under the IGRA (25 USC 2701 et seq.), a tribe may conduct gaming activities on "*Indian lands*" only if those activities are:

> "(A) Authorized by an ordinance or resolution that --
> (i) Is authorized by the governing body of the Indian tribe having jurisdiction over such lands;
> (ii) Meets the requirements of subsection (b) of this section; and
> (iii) Is approved by the Chairman.
> (B) Located in a state that permits such gaming for any purpose by any person, organization, or entity, and
> (C) Conducted in conformance with a ***tribal-state compact*** entered into by the Indian Tribe and the **State** under paragraph (3) that is in effect." (25USC 2710(d)(1)). (Emphasis added)

Further, Section 2710(d)(3)(b) of IGRA, which addresses contract negotiations, states: "Any ***State*** and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register."

The IGRA does not specify which State official(s) may sign a gaming compact on behalf of a ***State*** within the meaning of Sections 2710(d)(1) and 2710(d)(3)(b). In fact, nothing in the IGRA even suggests that Congress intended that the Secretary determine who is authorized to execute compacts on behalf of states. Case law indicates IGRA's silence on this point is due to

the fact that it would be unreasonable to expect that potentially complex questions of this nature could be adequately addressed by the Secretary of the Interior. *Pueblo of Santa Anna v Kelly*, 932 F Supp 1284, 1293 (D.N.M. 1996). Because the IGRA is silent on this issue, state law determines the procedures for executing valid gaming compacts. *Pueblo, supra* at 1294 citing: *Washington v Confederated Bands and Tribes of the Yakima Indian Nation*, 439 US 463; 99 S Ct 740 (1979).

Once a tribal-state gaming compact is signed, the IGRA provides that the Secretary may only disapprove it for one or more of three deficiencies: a violation of IGRA; a violation of another federal law; or a violation of the trust obligations of the United States. 25 USC 2710(d)(8)(B). In the absence of one of these violations, the Secretary must approve the compact. However, more important in the instant case is the IGRA's provision that a compact would be deemed approved, with or without the Secretary's approval, if the Secretary fails to act within 45 days of the submission of the compact. Section 2710(d)(8)(C).

Simply because a compact is deemed approved under Section 2710(d)(8)(C) due to the Secretary's inaction, the compact may not be operational. Compacts approved under Section 2710(d)(8)(C) are nonetheless void, <u>*as a matter of law*</u>, where the State officials who sign the agreements do not possess the requisite authority to bind the State to the compact. As the court in *Kickapoo Tribe of Indians v Babbit*, 827 F Supp 37 (D.C. Cir. 1993), *rev'd on other grounds*, 43 F3d 1491(D.C. Cir. 1995), ruled:

> "The fact that the compact is deemed approved, however, does not mean that the compact necessarily is binding and operational. Rather, as defendant's next argue, **even if the compact is deemed approved it nonetheless may be void if the Governor's inability to bind the State of Kansas renders the compact invalid.** Since Section 2710(d)(8)(C) states that the compact is deemed approved "only to the extent that the compact is consistent with the provisions of this chapter [i.e., IGRA]," if the compact conflicts with any provision of IGRA, the fact that the Secretary failed to act within the

forty-five day approval period is irrelevant; the compact still would be void." *Id.* at 44. (Emphasis added)

The Court in *Kickapoo* took note of the fact that the Supreme Court of Kansas had ruled that while the governor possessed the power to negotiate a compact, she did not have the power to sign the resulting compact. Relying upon this ruling, the Court found that as a matter of federal law, the State never entered into a compact as required by IGRA:

> "[T]he court concludes that the State of Kansas never entered into a compact as required by 25 U.S.C. Section 2710(d)(8)(A). The court accepts the determination of the Supreme Court of Kansas that the Governor did not have the authority to bind the State. As discussed above, the compact may be deemed approved only to the extent that it comports with IGRA. [citation omitted]. And **because only the Governor -- a person without authority -- signed the compact, the State did not enter into the compact**. Thus, the compact does not comply with Section 2710(d)(8)(A) and is invalid. In sum, although the compact initially is deemed approved due to the statutory mechanism of Section 2710(d)(8)(C), it ultimately is invalid due to the fact that it conflicts with Section 2710(d)(8)(A). *Id.* at 46. (Emphasis added)

The *Pueblo* court *supra*, echoed this rationale when it concluded that in enacting IGRA, Congress did not intend that the Secretary's approval override deficiencies in the compact under state law. Having thoroughly examined New Mexico law, the Court found that the governor's execution of a gaming compact had encroached upon the legislature's authority contrary to the state constitutional Separation of Powers Clause and the compacts were thus invalid. In reconciling this finding with the 45-day approval mechanism under IGRA, the Court held: "[T]he Secretary's approval is a separate requirement that puts a valid compact into operation. The Secretary's approval cannot in itself validate an otherwise invalid compact." *Pueblo, supra* at 1293.

All Class III tribal gaming activities under the IGRA gaming activities must be approved by the appropriate State official(s) in order to be binding. Section 2710(d) makes no distinction between activities conducted pursuant to an original tribal gaming compact with a state or those

gaming activities conducted pursuant to an amendment to a compact. The law expressly requires that ***all*** Class III tribal gaming be conducted in conformance with a tribal-state agreement between the tribe and the host ***state.*** It is not enough if only the original compact has been properly approved by the host state. Under the aforementioned language of the IGRA, subsequent compact amendments also require proper approval by the state for the new or revised gaming activities to go into effect.

Under the IGRA, the gaming activities under the amendatory compact ***must*** be conducted in conformance with a valid tribal-state compact between the Tribe and the ***State.*** The amended compact in this case is void, *as a matter of law* under *Kickapoo, supra*, because the Governor did not possess the requisite authority to bind the State to the compact. It matters not that the compact may have been deemed approved, it is nonetheless void because the Governor's inability to bind the State of Michigan renders the compact invalid under the IGRA.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court declare and adjudge that the Amendatory Agreement is unconstitutional and ineffective under Michigan law. *Amici Curiae*, therefore, request that such agreement be voided and that the pre-existing tribal gaming Compact between the Odawa Tribe and the State be declared to remain in effect and unchanged from the date of its original execution in 1998.

Respectfully Submitted,
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